

FILED
DISTRICT COURT OF GUAM
OCT 21 2003
MARY L. M. MORAN
CLERK OF COURT

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1 that would require a trial to resolve.

2 Dated this 21st day of October, 2003.

3 VERNIER & MAHER, LLP
4 Attorneys for Plaintiff
5 KAIOH SUISAN CO., LTD

6
7 BY:

8 
9 TERENCE E. TIMBLIN, ESQ.

10 MEMORANDUM OF POINTS AND AUTHORITIES

11 FACTUAL AND PROCEDURAL BACKGROUND

12 Plaintiff filed a Motion for Summary Judgment on February 6, 2003 arguing that
13 it was entitled to judgment as Defendant has admitted the existence of the written
14 Agreement and that it received and accepted 100,000,000 yen pursuant to the
15 Agreement, and is therefore barred by the parole evidence rule from altering,
16 amending or contradicting its terms. At the hearing on the Motion on March 28, 2003,
17 and in a subsequent written Order, the Court denied it on the basis that Defendant had
18 raised material issues of fact. Plaintiff filed a Trial Brief, as required by LR 16.7(b),
19 and a Witness List, as required by LR 16.7(d)(1), on July 29, 2003. The Trial Brief
20 addressed the factual issues that the Court regarded as material. The Preliminary
21 Pretrial Conference was held on October 9, 2003 at which time the Court ordered
22 Defendant to file its Trial Brief and Witness List by October 14, 2003. As of this
23 writing, Defendant has failed to file either a Trial Brief or a Witness List.

24 As required by LR 16.7(e), counsel for Plaintiff prepared a proposed Pretrial
25 Order and served it on Defendant on June 4, 2003. See, Exhibit "A". Counsel for

1 Defendant was requested to fill in the portion of the Order reserved for Defendant's
2 factual contentions and set forth any proposed changes. Despite several promises to
3 do so, counsel for Defendant was failed to take any action with respect to the
4 proposed Order. See, Exhibit "B".

5 6 **ARGUMENT**

7 Based on the admissions by Defendant in the pleadings and the memoranda
8 and exhibits set forth in the initial Motion for Summary Judgment and Plaintiff's Trial
9 Brief, the following facts are beyond any rational dispute:

10 That Defendant made a written request to Plaintiff to borrow 100,000,000
11 Japanese yen in two installments of 50,000,000 yen each.

12 That the parties signed a written agreement by which Defendant borrowed
13 one hundred million Japanese yen from Plaintiff in two installments of 50,000,000
14 yen each.

15 That Plaintiff transferred one hundred million Japanese yen to Defendant and
16 that Defendant has failed to repay any of this amount according to the schedule set
17 forth in the written agreement.

18 These facts are utterly consistent with a loan transaction and utterly
19 inconsistent with anything else. The most that Defendant has managed to offer thus
20 far is a denial that the transaction was a loan. What is completely absent are factual
21 allegations of what the transaction otherwise was. Defendant has been offered the
22 opportunity to make these allegations as part of the proposed Pretrial Order and has
23 failed to do so. Defendant has been ordered by the Court to file a Trial Brief setting
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1 forth its contentions and has again failed to do so. The obvious reason for this failure
2 is that Defendant has no plausible alternative explanation to the written documentation
3 of the transaction.

4 Since Defendant cannot even articulate, let alone prove, what the transaction
5 was if it was not a loan, a trial would be a waste of the resources of both the parties
6 and the Court. Summary judgment should, therefore, be entered.

7 Judgment should be granted for the further reason that the failure of
8 Defendant to disclose its version of events places Plaintiff at an unfair disadvantage
9 in preparing for trial.

10 Respectfully submitted this 21st day of October, 2003.

11
12 **VERNIER & MAHER, LLP**
13 Attorney for Plaintiff
14 **KAIOH SUISAN CO., LTD.**

15 BY:

16 
17 _____
18 **TERENCE E. TIMBLIN, ESQ.**
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CERTIFICATE OF SERVICE

I, **TERENCE E. TIMBLIN**, hereby certify that on the 21st day of October, 2003,
I caused a copy of the annexed **PLAINTIFF KAIOH SUISAN CO., LTD.'S**
RENEWED MOTION FOR SUMMARY JUDGMENT to be served upon Defendant,
by delivering and leaving a copy of same to its attorney of record, as follows:

Phillip Torres
TEKER CIVILLE TORRES & TANG, PLLC
Suite 200, 330 Hernan Cortez Avenue
Hagåtña, Guam 96910

Dated this 21st day of October, 2003.

VERNIER & MAHER, LLP
Attorneys for Plaintiff
KAIOH SUISAN CO., LTD.

BY: _____


TERENCE E. TIMBLIN

FRANCIS M. McKEOWN
D. PAUL VERNIER, JR.**
JOHN G. PRICE*
JOHN B. MAHER**
COLIN C. MUNRO*
LOUIE J. YANZA**
MICHAEL D. FLYNN, JR.
THOMAS S. CLIFTON*
TERENCE E. TIMBLIN**
JEANINE M. LARREA*



McKEOWN • VERNIER • PRICE • MAHER
ATTORNEYS AT LAW
A Joint Venture of McKeown Price, LLP
and Vernier & Maher, LLP

115 HESLER PLACE
GROUND FLOOR
GOV. JOSEPH FLORES BLDG.
HAGÄTNA, GUAM 96910-5004
TELEPHONE 671-477-7059
FACSIMILE 671-472-5487
www.mckeownlaw.com
E-MAIL vernier@ite.net

*ADMITTED IN CA
**ADMITTED IN GUAM

June 3, 2003

VIA FACSIMILE - 472-2601

Mr. Phillip Torres
TEKER CIVILLE TORRES & TANG, PLLC
Suite 200, 330 Hernan Cortez Avenue
Hagatna, Guam 96910

RE: KAIOH SUISAN CO., LTD. v. GUAM YTK CORP.
UNITED STATES DISTRICT COURT CIVIL CASE NO. CV02-00021
MVPM File No.: K-0010.4

Dear Phil:

Enclosed is a draft of a proposed Pretrial Order in the above matter. Please fill in your contentions in Paragraph 6 and make any other proposed changes.

I have included among the proposed admissions that Mr. Kamiyama signed the letter requesting the loan, as I do not think that he could deny that in good faith after his evasions at his deposition. Obviously, he is still free to offer whatever explanation he sees fit.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

McKEOWN • VERNIER • PRICE • MAHER


Terence E. Timblin

Enclosure

cc: Mr. Shunsaku Yuasa
Allen D. Clark, Esq.

\\Valerie\c\MarieBackup\My Documents\CLIENTS (NON-GIA)
00021\Correspondence\Torres 060303.doc

Exhibit
A

ich v Guam YTK - USDC CVA02-

BERKELEY OFFICE: 2030 ADDISON STREET, SUITE 300 • BERKELEY, CA 94704
TELEPHONE 510-549-8787 • FACSIMILE 510-549-8788

1 Terence E. Timblin
2 McKEOWN • VERNIER • PRICE • MAHER
3 A Joint Venture of McKeown Price LLP
4 and Vernier & Maher LLP
5 115 Hesler Place
6 Ground Floor, Governor Joseph
7 Flores Building
8 Hagåtña, Guam 96910
9 Telephone: (671) 477 7059
10 Facsimile: (671) 472-5487

11 Attorneys for Plaintiff
12 KAIOH SUISAN CO., LTD.

13 UNITED STATES DISTRICT COURT
14 DISTRICT OF GUAM

15 KAIOH SUISAN CO., LTD.

16 CIVIL CASE NO. 02-00021

17 Plaintiff,

18 vs.

19 PRETRIAL ORDER
20 [PROPOSED]

21 GUAM YTK CORP.,

22 Defendant.

23 Following Pretrial proceedings, pursuant to Rule 16, Federal Rules of Civil
24 Procedure, and Local Rule 16.7,

25 IT IS ORDERED:

1. (a) This is an action to recover One Hundred Million Japanese Yen
(¥100,000,000) paid by Plaintiff KAIOH SUISAN CO., LTD. ("KAIOH") to Defendant
GUAM YTK CORP. ("GUAM YTK"). Plaintiff KAIOH alleges that that this amount was
a loan to Defendant GUAM YTK, as evidenced by the Agreement attached to the

1 Complaint as **Exhibit A**, and seeks damages for failure to repay the loan pursuant to
2 the terms of the Agreement. Defendant GUAM YTK has denied that the transaction
3 was a loan and affirmatively pled that it was another form of investment and that
4 nothing is owed to Plaintiff KAIOH.

5 (b) The parties are: KAIOH SUISAN CO., LTD., a foreign corporation
6 organized and existing under the laws of Japan, Plaintiff GUAM YTK CORP., a
7 corporation organized, existing and doing business under the laws of Guam,
8 Defendant.

9
10 Each of these parties has been served and has appeared. All other parties
11 named in the pleadings and not identified in the preceding paragraphs are now
12 dismissed.
13

14
15 (c) The pleadings which raise the issues are:

16 Complaint, filed August 1, 2002

17 Answer to Complaint, filed August 16, 2002
18

19 **2. Jurisdiction and venue are invoked upon the grounds:**

20 Diversity of citizenship of the parties, pursuant to 28 USC §1332. The amount
21 due and payable, pursuant to the terms of the Agreement as of June 1, 2003, is
22 Eighty-Five Million Japanese Yen (¥85,000,000) with a dollar equivalent of
23 approximately Six Hundred Ninety Thousand Dollars (\$690,000.00), which exceeds
24
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1 the jurisdictional amount of Seventy-Five Thousand Dollars (\$75,000.00). The facts
2 requisite to federal jurisdiction are admitted.

3
4 **3. The following facts are admitted and require no proof:**

5 The Court has jurisdiction over this matter and the amount in controversy
6 exceeds \$75,000.00.

7 Plaintiff KAIOH at all times relevant herein, is a foreign corporation organized
8 and existing under the laws of Japan.

9 Defendant GUAM YTK is a corporation organized, existing and doing business
10 under the laws of Guam.

11 On or about March 10, 2001, Plaintiff KAIOH and Defendant GUAM YTK
12 entered into an Agreement by which Defendant GUAM YTK borrowed ¥100,000,000
13 from Plaintiff KAIOH; and that the actual transfer of the funds to Defendant GUAM
14 YTK was accomplished by way of two (2) wire transfers of Fifty Million Japanese Yen
15 (¥50,000,000) through a corporate subsidiary of Plaintiff KAIOH.

16 Pursuant to the terms of the Agreement, Defendant GUAM YTK is required to
17 repay the loan in installments of Five Million Japanese Yen (¥5,000,000) at the end of
18 each month beginning with January of 2002; Defendant GUAM YTK is required to pay
19 interest of two percent (2%) per annum from the date of the transfer of the funds, to be
20 calculated and paid after the final payment of principal is due; as of the end of May of
21 2003, ¥85,000,000 is due and payable, Defendant GUAM YTK has not paid any of this
22 amount; and that additional installments will become due and payable through August,
23 2003.
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1 During the course of negotiating the Agreement, Tom Kamiyama, the President
2 of Defendant GUAM YTK, signed a letter that is addressed to the Chairman of the
3 Board of Plaintiff KAIOH requesting a loan of ¥100,000,000 on terms similar to those
4 set forth in the Agreement. The letter is Plaintiff KAIOH's Exhibit ____.

5
6 4. The reservations as to the facts recited in paragraph 3, above, are
7 as follows: None.
8

9
10 5. The following facts, though not admitted, are not to be contested at
11 the trial by evidence to the contrary: None.
12

13 6. The following issues of facts, and no others, remain to be litigated
14 at the trial:

15 Defendant GUAM YTK asserts that, notwithstanding the written Agreement and
16 other documentation presented by Plaintiff KAIOH, that the transaction in question was
17 not a loan but a _____. Defendant GUAM YTK will offer
18 evidence to prove (to be completed by Defendant GUAM YTK)
19 _____
20 _____
21 _____
22 _____
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25 _____

1 7. **The following issues of law, and no others, remain to be litigated at**
2 **the trial:**

3 Whether Defendant GUAM YTK is precluded by 6 GCA §2511, the Guam parol
4 evidence rule, from using extrinsic evidence to vary or contradict the terms of the
5 Agreement.

6 Whether Defendant GUAM YTK is bound by a document voluntarily signed by
7 its President even if he did not understand English.

8 Whether Plaintiff KAIOH was required to have a Guam business license in
9 order to bring this action.

10
11
12 8. **All discovery is complete.**

13
14 9. **The Exhibit Lists of the parties have been filed with the Court as**
15 **required by Local Rule 16.7. The parties anticipate the following objections to**
16 **the exhibits listed below: None**

17
18 10. **Witness lists of the parties have heretofore been filed with the Court**
19 **as required in Local Rule 16.7. (Except for good cause shown, only the witnesses**
20 **identified in the list will be permitted to testify other than for impeachment or rebuttal.)**

1 11. Each party intending to present evidence by way of deposition
2 testimony has marked such depositions in accordance with Local Rule 32.1. For
3 this purpose, the following depositions shall be lodged with the clerk as
4 required by Local Rule 32.1: None

5
6 12. The following law and motion matters are pending or contemplated:
7 None
8

9
10 13. The trial is to be a non-jury trial. *(If requested by Court) At least seven*
11 *(7) days prior to the trial date each counsel shall serve on all parties and lodge with the*
12 *Court proposed findings of fact and conclusions of law.*

13
14 14. The trial is estimated to take two (2) trial days.

15
16 15. The Final Pretrial Conference shall be held on the Thursday, the 30th
17 day of October, 2003 at 3:00 p.m.

18
19 16. The Trial of this cause will be held on the Friday, the 13th day of
20 December, 2003 at 9:30 a.m.
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1 17. The foregoing admissions having been made by the parties, and the
2 parties having specified the foregoing issues of fact and law remaining to be litigated,
3 this Pretrial Conference Order shall supersede the pleadings and govern the course of
4 the trial of this cause, unless modified to prevent manifest injustice.

5 Dated this _____ day of October, 2003.

6
7
8
9 _____
10 HONORABLE JOHN S. UNPINGCO
11 CHIEF JUDGE, District Court of Guam

12
13 APPROVED AS TO FORM AND CONTENT.

14 TEKER CIVILLE TORRES & TANG, PLLC
15 Attorneys for Defendant
16 GUAM YTK CORP.

17 By _____
18 PHILLIP TORRES

19
20 \\Valerie\c\MarieBackup\My Documents\CLIENTS (NON-GIA)\KAIOH SUISAN CO. LTD\Kaioh v Guam YTK - USDC CVA02-
21 00021\Pleadings\Pretrial Order - Proposed 060203.doc

VERNIER & MAHER, LLP

D. Paul Vernier, Jr.
John B. Maher

115 Hesler Place, Ground Floor
Governor Joseph Flores Building
Hagatna, Guam 96910-5004
Telephone: (671) 477-7059
Facsimile: (671) 472-5487
Email: vernier@ite.net

Louie J. Yanza
Michael D. Flynn, Jr.
Terence E. Timblin

September 24, 2003

VIA FACSIMILE – 472-2601

Phillip Torres, Esq.
TEKER CIVILLE TORRES & TANG, PLLC
Suite 200, 330 Hernan Cortez Avenue
Hagatna, Guam 96910

RE: KAIOH SUISAN CO., LTD. v. GUAM YTK CORPORATION
DISTRICT COURT OF GUAM, CIVIL CASE NO. 02-00021

Dear Phil:

On June 4, 2003, we served a draft of a proposed Pretrial Order in the above matter on your office. We asked that you fill in your contentions in number 6 and make any other proposed changes. I spoke with you by phone on September 8, 2003, as to what your position on it was, and you indicated that you had filled in your contentions and filed it with the District Court. I requested that you serve me with a copy of the filed Order and you indicated that you would bring a copy with you to the Pretrial Conference in the Superior Court case that was scheduled for September 9, 2003. On September 9th, Sam Teker appeared at the Conference in your place. He did not have a filed copy of the Order and did not know anything about it. Sam Teker said he would talk to you about it. As of this writing, however, our office has not been served with a copy of the Order or otherwise heard from you.

This is to request that you confirm or deny that you have filed the Order and, if you have, that you serve us with a copy of it.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

VERNIER & MAHER, LLP


Terence E. Timblin

Exhibit

B

Confirmation Report - Memory Send

Time : Sep-24-03 16:43
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VERNIER & MAHER, LLP

D. Paul Vernier, Jr.
John B. Maher

115 Healer Place, Ground Floor
Governor Joseph Flores Building
Hagatna, Guam 96910-5004
Telephone: (671) 477-7059
Facsimile: (671) 472-5487
Email: vernier@ite.net

Louis J. Yanza
Michael D. Flynn, Jr.
Terence E. Timblin

FACSIMILE TRANSMITTAL COVER SHEET

TO: Phillip Torres, Esq. - 472-2601

FROM: Terence E. Timblin

DATE: September 24, 2003

RE: Kaioh Sulsan Co., Ltd. v. Guam YTK Corporation, CV02-00021

V&M FILE NO.: G-0001.171

NO. OF PAGES INCLUDING COVER SHEET: 3

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DOCUMENTS:

1. Letter from Terence E. Timblin, Esq., dated September 24, 2003.

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